Supreme Court, U.S.
FILED
JUL 12 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

No. 71-67

October Term, 1970

CHARLEROI-MONESSEN HOSPITAL,
Petitioner,

vs.

ROBERT F. PETTY, Guardian of the Estate of Ardell Donaldson,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NORMAN J. COWIE, ESQUIRE,
1524 Frick Building,
Pittsburgh, Pennsylvania 15219,
Counsel for Petitioner.

Of Counsel:
THOMSON, RHODES & GRIGSBY.

BATAVIA TIMES. APPELLATE COURT PRINTERS,
EDWARD W. SHANNON, REPRESENTATIVE,
P. O. BOX 10945, PITTSBURGH, PA., 15236,
412-881-7463.

INDEX.

	PAGE
Petition for Writ of Certiorari	1
Reports of Opinions of Lower Courts	1
Grounds Upon Which Jurisdiction is Invoked	2
Questions Presented	2
Constitutional and Statutory Provisions Involved in the Case	3
Statement of the Case	4
Reasons for Allowance of Writ	7
Matters Appended	15
Appendix:	
A. Plaintiff's Complaint	17
B. Order of the United States District Court dated April 14, 1969	21
C. Order of the United States District Court dated October 15, 1969	22
D. Order of the United States District Court dated November 14, 1969	24
E. Memorandum and Order of United States District Court dated March 25, 1970	25
F. Order of United States District Court dated April 8, 1970	30
G. Opinion of United States Court of Appeals for the Third Circuit dated March 1, 1971	32
H. Judgment of the United States Court of Appeals for the Third Circuit dated March 1, 1971	34
I. Order denying Petition for Rehearing dated April 13, 1971	36

PAGE

Table of Citations.

Table of Cases.

American Fire & Casualty Co. v. Finn, 314 U. S. 6, 71 S. Ct. 534, 95 L. Ed. 702 (1951) 10
Ansaldi v. Kennedy, 41 F. 2d 858 (D. Mass. 1930) 13
Berkowitz v. Philadelphia Chewing Gum Corporation, 303 F. 2d 585 (3d Cir. 1962) 13
Bertinelli v. Galoni, 331 Pa. 73, 200 Atl. 58 (1938) 14
Borror v. Sharon Steel Company, 327 F. 2d 165 (3d Cir. 1964) 12
Cooper v. Reynolds, 77 U. S. (10 Wall.) 308 (1870) ... 8
DuRoure v. Alvord, 120 F. Supp. 166 (S. D. N. Y. 1954) 13
Elgin v. Marshall, 106 U. S. 578, 1 S. Ct. 484, 27 L. Ed. 249 (1882) 10
Esposito v. Emery, 402 F. 2d 878 (3d Cir. 1949) 12
Fallat v. Gouran, 220 F. 2d 225 (3d Cir. 1955) 12
Freeman v. Lawton, 353 Pa. 613, 46 A. 2d 205 (1946) .. 9
Gaines v. Fuentes, 92 U. S. 578 (2 Otto) 10 (1875) 9
Gidinski v. McWilliams, 308 F. Supp. 772 (D. Ore. 1970) 13
Hepburn v. Griswold, 75 U. S. (8 Wall.) 603 (1870) .. 10
In re Burrus, 136 U. S. 586 (1889) 8
In the Matter of Barry, 136 U. S. 586, 597 8
Kilbourn v. Thompson, 103 U. S. (13 Otto) 168 (1881) 10
Lehigh Mining and Manufacturing Company v. Kelly, 160 U. S. 327; 16 S. Ct. 307, 40 L. Ed. 444 (1895) 13
Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965) 11
Lockerty v. Phillips, 319 U. S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943) 10
Martineau v. City of St. Paul, 172 F. 2d 777 (8th Cir. 1949) 12, 13
McSparran v. Weist, 402 F. 2d 867 (3d Cir. 1968) ..5, 7, 12
Mexican Central Railway Co. v. Eckman, 187 U. S. 429, 23 S. Ct. 211, 47 L. Ed. 245 (1903) 13
Mitchell v. Maurer, 293 U. S. 237, 55 S. Ct. 162, 79 L. Ed. 338 (1934) 10
Rodgers v. Baits, 431 F. 2d 16 (8th Cir. 1970) 13
Rose v. Himely, 4 Cranch 241 (1808) 8
Rosensweig v. Heller, 302 Pa. 279, 153 Atl. 346 (1931) 9

PAGE

Saint Paul Mercury Indemnity Company v. Red Cab Company, 303 U. S. 283, 58 S. Ct. 586, 82 L. Ed. 845 (1938) 10
Smith v. Sperling, 354 U. S. 91, 77 S. Ct. 1112, 1 L. Ed. 2d 1205 (1957) 11
Snyder v. Harris, 394 U. S. 332, 89 S. Ct. 1053, 22 L. Ed. 2d 319 (1969) 10
Supine v. Compagnie Nationale Air France, 100 F. Supp. 214 (E. D. N. Y. 1952) 13
Thames v. State of Mississippi, 117 F. 2d 949 (5th Cir. 1941) 13
United States v. Arrendendo, 31 U. S. (6 Pet.) 691 (1832) 8
Voorhees v. Bank of the United States, 35 U. S. (10 Pet.) 469 (1836) 8
West Coast Exploration Co. v. McKay, 213 F. 2d 582 (D. C. Cir. 1954) 8
Williams v. Georgia, 349 U. S. 375, 75 S. Ct. 814, 99 L. Ed. 1161 (1955) 15
Ziady v. Curley, 396 F. 2d 873 (4th Cir. 1968) 13

TABLE OF CONSTITUTIONAL PROVISIONS.

U. S. Const., Art. I, Sec. 8 4
U. S. Const., Art. III, Sec. 1 3
U. S. Const., Art. III, Sec. 2 3

TABLE OF STATUTES.

28 U. S. C. § 1254(1) 2
28 U. S. C. § 2101(c) 2
28 U. S. C. § 1332 4
28 U. S. C. § 1359 ..... 4, 13

TABLE OF RULES.

Fed. R. Civ. P. 17 (b) 14
Fed. R. Civ. P. 17 (c) 14
Pa. R. Civ. P. 2034 14
Pa. R. Civ. P. 2035 14

OTHER AUTHORITIES.

3A Moore's Federal Practice, Para. 17.04, pp. 112-120 (2d ed. 1970) 11, 12, 13
2 Goodrich-Amram, Standard Pennsylvania Practice, § 2027-2 14

IN THE

Supreme Court of the United States

No. .....

October Term, 1970

CHARLEROI-MONESSEN HOSPITAL,
Petitioner,

vs.

ROBERT F. PETTY, Guardian of the Estate of Ardell Donaldson,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

I. Reports of Opinions of Lower Courts.

At the time of the preparation, printing and filing of this Petition for Writ of Certiorari, the Opinions of the United States District Court for the Western District of Pennsylvania at Civil Action No. 68-168 and the Opinion of the United States Court of Appeals for the Third Circuit at No. 18970 have not been officially or unofficially reported.

The opinion of the United States District Court for the Western District of Pennsylvania is attached as Appendix E; and the Opinion of the United States Court of Appeals for the Third Circuit is attached as Appendix G.

II. Grounds Upon Which Jurisdiction is Invoked.

This is a proceeding from a judgment of the United States Court of Appeals for the Third Circuit dated March 1, 1971 (Appendix H). The Petitioner filed a timely petition for rehearing on March 13, 1971 which sought to overturn the decision and judgment of the United States Court of Appeals in its entirety. This petition was denied by the Court of Appeals on April 13, 1971 (Appendix I).

Jurisdiction of this matter is conferred upon the Supreme Court of the United States by 28 U. S. C. § § 1254 (1) and 2101(c), the former of which authorizes cases in the Court of Appeals to be reviewed by the Supreme Court "by writ of certiorari granted upon the petition of any party to any civil . . . case before or after rendition of judgment or decree . . .."

Questions Presented

I. Where both the District Court and the Court of Appeals correctly concluded that the diversity jurisdiction relied upon by the plaintiff was "manufactured" and no genuine diversity jurisdiction existed, and the District Court clearly indicated it would have dismissed the action but for the prior direction of the Court of Appeals not to do so where the Statute of Limitations had run before entry of the proposed order of dismissal, and where the defendant had moved to dismiss long before the expiration of the Statute of Limitations, is not the Court of Appeals in error in thus creating a new basis for Federal jurisdiction?

II. Where a minor who is a citizen of Pennsylvania is injured in Pennsylvania, allegedly by the torts of another citizen of Pennsylvania, and the minor and the alleged tortfeasors remain Pennsylvania citizens at the time suit is filed to recover damages to which the minor is claimed to be entitled, is the citizenship of a nominal guardian of any consequence in determining diversity?

III. Where a constitutional question has been properly raised does not a party have a constitutional right to have a lower appeals court decide that question?

Constitutional and Statutory Provisions Involved in the Case

The Constitution of the United States, Article III, Section 1, provides as follows:

> "The Judicial Power of the United States, shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish."

The Constitution of the United States, Article III, Section 2 provides as follows:

> "The Judicial Power shall extend to all Cases, in in Law and Equity, arising out of this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their Authority . . . to Controversies . . . between citizens of different states . . ..
>
> "In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have original Jurisdiction. In all other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The Constitution of the United States, Article I, Section 8 also provides: "The Congress shall have Power . . . To constitute Tribunals inferior to the supreme Court . . ."

The Congress of the United States, in promulgating the Judicial Code, provided in 28 U. S. C. § 1332 (a) as follows:

> "The district court shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and is between—
>
> (1) citizens of different States;
>
> (2) citizens of a State, and foreign states or citizens or subjects thereof; and
>
> (3) citizens of different States and in which foreign states or citizens or subjects thereof are additional parties."

The Congress of the United States also provided in the same Judicial Code at 28 U. S. C. § 1359 as follows:

> "A district court shall not have jurisdiction of a civil action in which any party, by assignment or otherwise, has been improperly or collusively made or joined to invoke the jurisdiction of such court."

Statement of the Case

The petitioner is a defendant in a civil action brought in the United States District Court for the Western District of Pennsylvania wherein Robert F. Petty, a New Jersey domiciliary, who was appointed as guardian of the Estate of Ardell Donaldson, a Pennsylvania minor, filed a complaint alleging that the minor sustained personal injuries as a result of negligent treatment by individual doctor defendants while a patient in the corporate defendant's (petitioner's) hospital. The sole basis for federal jurisdiction asserted by plaintiff is diversity of citizenship. The events complained of allegedly occurred during the month

of April of 1967. On October 8, 1968, all defendants filed a motion to dismiss the action on the grounds that Robert S. Petty was appointed guardian of the Estate of Ardell Donaldson, a minor, solely for the purpose of creating diversity jurisdiction in the District Court.

The District Court, on April 14, 1969 found that Robert F. Petty was appointed as guardian for the sole purpose of creating diversity jurisdiction between the parties. The Court found that there was ample time and opportunity for the plaintiff to institute a new action in the appropriate state court and further found that no unreasonable burden would be imposed on the plaintiff by the dismissal which the court thereupon ordered. The plaintiff then moved to alter and amend the judgment on various grounds, one of which was that the Statute of Limitations had expired prior to receipt of the Court's order, thereby prejudicing plaintiff-guardian and the minor. Thereupon, the District Court, on October 15, 1969, found that prior to April 14, 1969, no state process had been served on nor had any state action been commenced against the defendant-petitioner Charleroi-Monessen Hospital. The Court also found that the Statute of Limitations applicable to the plaintiff's claim had expired prior to receipt by his counsel of the order of dismissal.

Feeling that one of the essential guidelines in *McSparran v. Weist,* 402 F. 2d 867 (3d Cir. 1968) had not been met, the District Court vacated the order of dismissal as to the defendant Charleroi-Monessen Hospital. However, since the Court further found that state actions had been commenced against the two remaining defendants, the plaintiff's motion as to them was denied. While this order was later vacated by an order of court dated November 14, 1969, it was in effect reinstated by the order of March 25, 1970.

In making its final determination of the jurisdictional question presented it should be noted that the District Court expressly found that the filing of the order to dismiss on the same day that the Statute of Limitations became effective was a "mere fortuitious circumstance" and did not prejudice the plaintiff (App. E, p. 27); that during the period between the hearing on defendant's original motion to dismiss and the court's original order of dismissal, state actions were commenced against the individual defendants alone (App. E, p. 27); that counsel for the plaintiff made a "calculated and negative decision on the issue of agency between individual and corporate defendants" (App. E, p. 27); that no valid reason for the "appointment" (selection) of the plaintiff as a guardian of the minor was established (App. E, p. 27); that the plaintiff had had ample time to institute state court action against the defendant-petitioner Charleroi-Monessen Hospital (App. E, p. 27); that the plaintiff chose to permit the Statute of Limitations to run with respect to the hospital defendant (App. E, p. 28); and that the dismissal was not entered before the last day for filing a state court action against the defendant-petitioner Charleroi-Monessen Hospital (App. E, p. 28).

The district court thereupon concluded as a matter of law that diversity of citizenship was "manufactured" for the purpose of creating jurisdiction in the United States District Court which would not otherwise have existed but for the appointment of the New Jersey Guardian.

The United States Court of Appeals for the Third Circuit affirmed the factual determinations made by the District Court holding that "the record contains ample support for the findings and we will not disturb them" (App. G, p. 33). The Court of Appeals agreed with the District Court that no real diversity of citizenship existed between the parties

but reaffirmed its prior direction that the expiration of the Statute of Limitations on the plaintiff's claim prevented the dismissal of the action.

The first two questions that are being presented to this Court in this petition were presented to the United States Court of Appeals for the Third Circuit. The constitutional issue raised in the first question was not discussed by the Court of Appeals and the second question, while also briefed and argued, was not even mentioned by the Court of Appeals.

Reasons for Allowance of Writ

1. The United States Court of Appeals for the Third Circuit has established a rule that is in conflict with the decisions of the Supreme Court of the United States dealing with the fundamental nature of diversity jurisdiction. The jurisdiction thus created so far departs from the Constitution and the established standards for federal jurisdiction as to require the intervention of this court.

The rule that the United States Court of Appeals for the Third Circuit announced in *McSparran* and to which it has adhered through the present case is: Where a district court concludes that the diversity jurisdiction in a civil action before it is "manufactured", and where without the "manufactured" jurisdiction the court would be powerless to proceed, the court may nevertheless proceed as though it had jurisdiction if the running of the Statute of Limitations prevents the plaintiff from filing a timely action in an appropriate state court. The Court of Appeals has therefore created a jurisdiction over the subject matter *by convenience* where jurisdiction otherwise does not exist.

This Court has, since the very early days of the federal judiciary, stressed the necessity for the basic elements of

subject matter jurisdiction to be present. See the opinion of Mr. Chief Justice Marshall in *Rose v. Himely*, 4 Cranch 241 (U. S. 1808). In *Cooper v. Reynolds*, 77 U. S. (10 Wall.) 308 (1870), this Court held that jurisdiction over the subject matter is conferred by the sovereign authority which organized the court and is to be sought for either in the general nature of its powers or in the authority specifically conferred upon it. But if one essential requisite to jurisdiction is missing, the court can proceed no farther. 77 U. S. at 319. The court can either act upon a matter or not solely on the basis of the very nature of the judicial authority conferred upon it in the first instance. *Voorhees v. Bank of the United States*, 35 U. S. (10 Pet.) 469, 474, 475 (1836). See the cases summarized and gathered together in *West Coast Exploration Co. v. McKay*, 213 F. 2d 582, 591-592 (D. C. Cir. 1954). See also *United States v. Arrendondo*, 31 U. S. (6 Pet.) 691 (1832).

In the case of *In re Burrus*, 136 U. S. 586 (1889) to which case this Court appended the opinion in *In The Matter of Barry*, (136 U. S. at 597), this Court, through the appended case, pointed out that the United States Courts derived no *jurisdiction* from the common law but derived their jurisdiction solely from the Constitution and statutes and that once jurisdiction attaches, the remedies in those courts are according to principles of the common law. The court held:

> "The evidence must go further, and prove that the particular subject matter is one over which the courts are by act of Congress appointed to act, or that the question is in relation to the remedy alone and not to the jurisdiction of the court." 136 U. S. 608.

This Court specifically held further that the federal courts "possess no jurisdiction other than that which both the Constitution and Acts of Congress concur in conferring

on them." 136 U. S. 609. These cases are important because they clearly distinguish between jurisdiction and remedies and the sources of authority for each—which basic matters have been completely overlooked and disregarded by the United States Court of Appeals for the Third Circuit. It should be noted that under the principles of the common law in Pennsylvania, the Statute of Limitations is a matter that pertains only to the remedy. *Freeman v. Lawton*, 353 Pa. 613, 46 A. 2d 205, 207 (1946); *Rosensweig v. Heller*, 302 Pa. 279, 285-286, 153 Atl. 346 (1931).

In *Gaines v. Fuentes*, 92 U. S. (2 Otto) 10 (1875), this Court had before it a case which required the Court to determine the source of its jurisdiction in diversity cases. After holding that its basic authority rested upon the Constitution of the United States, and particularly the Judiciary Article, and the statutes passed by the Congress pursuant thereto, this Court expressly held that the conditions upon which the judicial power of the United States shall be exercised, except insofar as they are specifically stated by the Constitution, are matters of legislative direction. While noting that some cases by their very nature are exclusively within the judicial power of the United States, this court further pointed out:

> "In cases where the judicial power of the United States can be applied only because they involve controversies between citizens of different States, it rests entirely with Congress to determine at what time the power may be invoked, *and upon what conditions* . . ." 92 U. S. at 17-18 (emphasis added).

It is clear, then, that the United States Court of Appeals for the Third Circuit has exercised a power which belongs exclusively to the Congress, *i.e.*, it has placed a special condition upon diversity jurisdiction (if, indeed, it has not

created a new species of jurisdiction). The matter of Congressional right was further emphasized by this Court in *Lockerty v. Phillips*, 319 U. S. 182, 63 S. Ct. 1019, 87 L. Ed. 1339 (1943); and in *Saint Paul Mercury Indemnity Company v. Red Cab Company*, 303 U. S. 283, 288, 58 S. Ct. 586, 82 L. Ed. 845, 848 (1938), this Court emphasized that jurisdictional restrictions are intended as a limitation on the judicial power of the federal courts and diversity jurisdiction is jealously restricted. A diversity statute must be strictly construed and the Federal Courts must confine their own jurisdiction to the precise limits which the statute has defined. Once a federal court has determined that there is no diversity of citizenship, it can take no further action. *Mitchell v. Maurer*, 293 U. S. 237, 55 S. Ct. 162, 79 L. Ed. 338 (1934). And see *Elgin v. Marshall*, 106 U. S. 578, 1 S. Ct. 484, 27 L. Ed. 249 (1882). The lower federal courts have never been permitted to expand their jurisdiction by judicial interpretation. *American Fire and Casualty Co. v. Finn*, 314 U. S. 6, 17-18, 71 S. Ct. 534, 95 L. Ed. 702, 710-711 (1951). Any expansion of the jurisdiction of the Federal Courts must be done by the Congress since the Constitution specifically vests that power in the Congress and not in the courts. *Snyder v. Harris*, 394 U. S. 332, 342, 89 S. Ct. 1053, 22 L. Ed. 2d 319, 827 (1969). Where one branch of government seeks to exercise power constitutionally reserved to another, there is an impermissible encroachment on the constitutional system of separation of power which "shall not be permitted . . ." *Kilbourn v. Thompson*, 103 U. S. (13 Otto) 168, 191 (1881); see *Hepburn v. Griswold*, 75 U. S. (8 Wall.) 603, 611 (1870).

Therefore, the decision and judgment of the United States Court of Appeals for the Third Circuit is directly in conflict with the long established constitutional limita-

tions on the judicial power as well as the settled judicial policy of this Court, and a full review should be granted.[1]

2. The second proposition advanced is that the citizenship of the minor plaintiff rather than the citizenship of the formal guardian must control the determination of diversity. It is submitted that this raises an extremely important question of federal law which has not been, but should be, clearly settled by this court. It should be noted at the outset that in *Smith v. Sperling*, 354 U. S. 91, 77 S. Ct. 1112, 1 L. Ed. 2d 1205 (1957), this Court held that there is true diversity jurisdiction only when the "real collision of issues" is between citizens of different states. 354 U. S. at 97, 1 L. Ed. 2d at 1211-1212. Therefore, in determining who really owns the cause of action, we ultimately have a substantive and jurisdictional problem and not simply a procedural one.

The law in this regard is probably best summarized in 3A Moore's Federal Practice, Paragraph 17.04, pp. 112-120 (2d Ed. 1970). There the rule is stated that where a party sues in a representative capacity, his citizenship is the one that is normally material and the jurisdiction is dependent upon the character of the parties. This is true of a general

[1] The Court of Appeals (with one exception) erroneously relies upon Linkletter v. Walker, 381 U. S. 618, 85 S. Ct. 1731, 14 L. Ed. 2d 601 (1965) and other similar cases as authority for its jurisdictional rule. These cases are inapposite because in none of these cases was the jurisdiction of the court in question. They involved the question of whether a newly announced constitutional principle concerning the constitutional rights of criminal defendants should be made retroactive or have prospective application only. In the case at bar, we are confronted with a pure jurisdictional question where the Court of Appeals has decided that there is no diversity but that the lack of diversity shall only deprive the courts of jurisdiction prospectively but not retroactively and that, retroactively, the courts may proceed as though jurisdiction existed because of the hardship that may be imposed upon parties who have relied upon its prior and admittedly erroneous decisions.

guardian of a minor or guardian of an incompetent person when under the law of the state where he is appointed he has the status of a real fiduciary. But where the law under which he acts as such guardian merely gives him the status of a nominal fiduciary, then it is the citizenship of the ward and not that of the guardian that is determinative since the ward is the real party in interest and not the guardian. Such guardians are persons whom the court considers to be formal parties but who have no actual interest or control over the subject matter of the litigation. In this connection the commentator notes that the United States Court of Appeals for the Third Circuit in *Fallat v. Gouran*, 220 F. 2d 225 (3d Cir. 1955), partially disagrees with the rationale held by the other Federal Courts and has advanced the theory that the real party in interest rule is irrelevant in determining citizenship of diversity suits and suits by representatives. Under the view of the Third Circuit, the only test that is applied is whether the representative has the capacity to bring suit under the state law. If he has this capacity, then his citizenship controls in the Third Circuit. The commentator emphatically points out that the position of the Third Circuit carried to its logical conclusion "will overturn precedents by allowing jurisdiction to be determined by the citizenship of nominal parties if they have capacity to sue." 3A Moore, *op. cit. supra*, p. 120. This demonstrates an additional reason for this Court to review this case; *i.e.*, that decisions of the United States Court of Appeals for the Third Circuit are in conflict with the rulings of the other circuits in allowing the citizenship of a formal party plaintiff to be controlling. *Cf. Fallat v. Gouran, supra; Borror v. Sharon Steel Co.*, 327 F. 2d 165 (3d Cir. 1964); *McSparran vs. Weist*, 402 F. 2d 867 (3d Cir. 1968); and *Esposito v. Emery*, 402 F. 2d 878 (3d Cir. 1949); with *Martineau v. City of*

St. Paul, 172 F. 2d 777 (8th Cir. 1949); *Rodgers v. Baits*, 431 F. 2d 16 (8th Cir. 1970) (which case clearly draws the distinction made by *Moore; Thames v. State of Mississippi*, 117 F. 2d 949 (5th Cir. 1941); *DuRoure v. Alvord*, 120 F. Supp. 166 (S. D. N. Y. 1954); *Ansaldi v. Kennedy*, 41 F. 2d 858 (D. Mass. 1930); *Supine v. Compagnie Nationale Air France*, 100 F. Supp. 214 (E. D. N. Y. 1952); *Gidinski v. McWilliams*, 308 F. Supp. 772 (D. Ore. 1970); and see *Berkowitz v. Philadelphia Chewing Gum Corporation*, 303 F. 2d 585 (3d Cir. 1962). The cases in the Third Circuit are also in conflict with the basic rationale of *Lehigh Mining and Manufacturing Company v. Kelly*, 160 U. S. 327, 16 S. Ct. 307, 40 L. Ed. 444 (1895). And compare also *Ziady v. Curley*, 396 F. 2d 873 (4th Cir. 1968). The trouble apparently lies in the interpretation of *Mexican Central Railway Co. v. Eckman*, 187 U. S. 429, 433-434, 23 S. Ct. 211, 213, 47 L. Ed. 245 (1903), which case dealt with a Texas guardian of an Illinois minor (and which case contains language in which many of the courts appear to find some comfort). The case, while involving a venue problem, does maintain that distinction stated by Moore and the Eighth Circuit but disregarded by the Third Circuit. The problem appears to lie in a confusion of 28 U. S. C. § 1359 principles where genuine fiduciaries are involved, with the principles governing those cases where only a formal fiduciary is involved and where there may or may not be any suggestion of collusion or "manufactured diversity." For in any formal party situation, whether or not the formal party is the only one available to appear on the record for the minor party, the question of "manufactured diversity" or collusion is never reached; in such a case the citizenship of the formal party can never be controlling and the citizenship of the party must be that of the minor. Since

the characterization depends upon state law, it therefore becomes vital that the United States Court of Appeals for the Third Circuit has completely disregarded the characterization and status given to such formal guardian or fiduciary by the courts of Pennsylvania.

The Supreme Court of Pennsylvania has made it clear that such a guardian plaintiff as the one at bar is only a person who is responsible for court costs and who supplies "the want of capacity in the minor" to bring his action, but that such a person is not a real party in interest at all. *Bertinelli v. Galoni*, 331 Pa. 73, 75, 200 Atl. 58 (1938). See also 2 Goodrich-Amram, Standard Pennsylvania Practice, § 2027-2, where the commentator points out that the question under Pennsylvania law is whether the cause of action belongs to the guardian as fiduciary or to the minor himself. *Bertinelli* answers this question for the purposes of the minor's right asserted in this civil action. And see Pa. R. Civ. Pp. 2034 and 2035; and Fed. R. Civ. P. 17(b) and (c). It is submitted that the controlling authorities cited above require this reference to Pennsylvania law and the recognition that the plaintiff guardian has only the status of a formal fiduciary whose citizenship is irrelevant.

Therefore, since the decision and judgment of the United States Court of Appeals for the Third Circuit is contrary to the spirit of the decisions of this Court, is clearly and directly contrary to the weight of federal authority, has created and maintained a conflict between Courts of Appeals, and does involve an important question of federal jurisdictional law that should be settled by this Court, a full judicial review should be granted.

3. The petitioner also asserts its right to have a constitutional question, properly raised, decided by the lower appeals court. In the Court of Appeals, your petitioner specifically raised and argued the first issue set out above. The Court of Appeals decided all other questions adversely to your petitioner and declined to entertain the constitutional argument under Article III of the Constitution of the United States. *Cf. Williams v. Georgia*, 349 U. S. 375, 383, 75 S. Ct. 814, 99 L. Ed. 1161, 1170 (1955).

It is respectfully submitted that the petitioner has a right to a decision on such an important constitutional question as that raised and a full judicial review of the matter is required.

Matters Appended

The following matters are appended hereto in compliance with Supreme Court Rule 23(i):

A. Plaintiff's Complaint;

B. Order of the United States District Court dated April 14, 1969;

C. Order of the United States District Court dated October 15, 1969;

D. Order of the United States District Court dated November 14, 1969;

E. Memorandum and Order of the United States District Court dated March 25, 1970;

F. Order of United States District Court dated April 8, 1970;

G. Opinion of United States Court of Appeals for the Third Circuit dated March 1, 1971;

H. Judgment of the United States Court of Appeals for the Third Circuit dated March 1, 1971;

I. Order denying Petition for Rehearing dated April 13, 1971.

Respectfully submitted,

NORMAN J. COWIE, ESQUIRE,
Counsel for Petitioner.

THOMSON, RHODES & GRIGSBY,
Of Counsel.

APPENDIX

Appendix A

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT F. PETTY, Guardian of the Estate of ARDELL DONALDSON, a minor,

Plaintiff,

vs.

E. E. SOMERS, W. J. MITCHELL and CHARLEROI-MONESSEN HOSPITAL,

Defendants.

Civil Action No. .....

COMPLAINT.

Plaintiff by his counsel, hereby demands damages of the defendants in the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) upon a cause of action whereof the following is a statement:

1. Plaintiff Robert F. Petty is a citizen of New Jersey, residing therein at 29 Hinshaw Ave., Dover, New Jersey; he is the duly appointed guardian of the Estate of Ardell Donaldson, a minor, having been so appointed by the Honorable C. G. Sweet, President Judge of the Orphans' Court of Washington County, Pennsylvania, on August 10, 1967.

2. Defendants E. E. Somers and W. J. Mitchell are residents of the Commonwealth of Pennsylvania and are duly licensed doctors of medicine; defendant Charleroi-Monessen Hospital is a corporation with its principal place of business and offices in North Charleroi, Pennsylvania.

3. The amount in controversy is in excess of $10,000.00 exclusive of interest and costs, and jurisdiction is founded upon diversity of citizenship.

4. On or about April 11, 1967, Ardell Donaldson, the minor, then 4 years of age, fell off a ladder and sustained a dislocated elbow and fracture of the proximal extremity of the ulna of the right arm. He was taken to the Charleroi-Monessen Hospital, North Charleroi, Penna. where he came under the treatment and care of defendants, who immobilized the right arm in a long arm cast. Shortly thereafter, the minor had increasingly severe complaints of tightness and discomfort of the arm in the cast which was applied with excessive tightness. The following day, the cast was partially split by the defendants because of the edema of the hands and fingers. Two days later, on Friday, April 14, 1967, there was noticed by defendants persistant edema, and other symptoms and the cast was entirely removed. It was then noticed by defendants that there was *inter alia* impairment of circulation where the cast had made pressure; a loose fitting long arm cast was then applied. But on the following day, Saturday, April 15, 1967, there was, in addition to persistent edema of the fingers, anesthesia and paralysis of the fingers and other symptoms.

5. Plaintiff avers that defendants were guilty of negligence and/or wilful and wanton misconduct in the following respects:

a. They failed to properly diagnose the condition of the minor.

b. They failed to properly care for the minor.

c. They failed to warn of the risks and dangers involved.

d. They applied too tight a cast.

e. They failed to follow the application of the cast with proper inspection, progress observation and other tests and procedures.

f. They failed to remove the too tight cast soon enough after indications of tightness.

6. The injuries, disabilities and damages sustained by the minor resulted solely from said negligence, wilful and wanton misconduct and wrongful acts of commission and omission of the defendants.

7. The defendant doctors were employees or agents of the defendant hospital and were assisted in their treatment of plaintiff child by other employees of the defendant and conducted the treatment and care under the rules, regulations and supervision of the defendant hospital.

8. As a result of defendants' negligence and wilful and wanton misconduct, as aforesaid, the minor plaintiff suffered a permanent paralysis of the right hand, fingers, arm, elbow and the nerves therein and necrosis of the skin in said areas requiring several surgical operations to improve and alleviate said condition; shock; injury to his nerves and nervous system, a traumatic neurosis and various other ills and injuries, the full extent and nature of which are not known at the present.

9. As a result of the defendant's negligence, etc., as aforesaid, the minor plaintiff was obliged to endure great physical pain and mental anguish, and will continue to endure same for an indefinite time in the future, to his great detriment and loss.

10. As a result of the defendants' negligence, etc., as aforesaid, the minor plaintiff has been unable to attend to his usual daily duties, occupations and labors, and will continue to be unable to do so for an indefinite time in the future, to his great detriment and loss.

11. As a result of defendants' negligence, etc., as aforesaid, the minor plaintiff has suffered great loss and depreciation of his earning capacity, and will continue to suffer same for an indefinite time in the future, to his great detriment and loss.

12. As a result of the defendants' negligence, etc., as aforesaid, the plaintiff has been obliged to expend various and divers sums of money for medicines and medical treatment and care, in and about an effort to cure the minor of the ills and injuries which he has suffered, and will continue to be obliged to do so for an indefinite time in the future to his great detriment and loss.

Wherefore, plaintiff claims damages in the amount of $250,000.00 as follows:

a. Pain and suffering, past and future;

b. Medical expenses, past and future;

c. Loss of earnings and impairment of earning power;

d. Exemplary and punitive damages.

Plaintiff demands a jury trial.

HYMEN SCHLESINGER,
ISADORE SCHLESINGER,
Attorneys for Plaintiff.

Appendix B

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT F. PETTY, Guardian of the Estate of ARDELL DONALDSON, a minor,

Plaintiff,

vs.

E. E. SOMERS, W. J. MITCHELL and CHARLEROI-MONESSEN HOSPITAL,

Defendants.

Civil No. 68-168.

ORDER.

AND Now, this 14th day of April, 1969, upon due consideration of arguments and briefs of counsel as well as the deposition of Robert F. Petty, it appearing that the said Robert F. Petty, plaintiff in the above action, was appointed as guardian for the sole purpose of creating diversity of citizenship between the parties, that there is ample time and opportunity for the plaintiff to institute a new action in the appropriate state court, and that no unreasonable burden will be imposed on the plaintiff, IT IS ORDERED that the above action be and the same is hereby dismissed. *McSparran et al. v. Weist et al.*, 402 F. 2d 867 (3 Cir. 1968).

S/ HERBERT P. SORG, *D. J.*

cc: Hymen Schlesinger, Esq.
716 Carlton House, Pgh., Pa. 15219

Bruce R. Martin, Esq.
945 Oliver Bldg., Pgh., Pa. 15222

Appendix C

Received
Oct 16 1969
THOMSON, RHODES & GRIGSBY

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT F. PETTY, Guardian of the Estate of ARDELL DONALDSON, a minor,

Plaintiff.

vs.

E. E. SOMERS, W. J. MITCHELL and CHARLEROI-MONESSEN HOSPITAL,

Defendants.

Civil No. 68-168.

ORDER.

AND NOW, this 15th day of October, 1969, after argument and upon due consideration of plaintiff's Motion to Alter or Amend Judgment of Dismissal entered in the above case on April 14, 1969, it appearing that on the date thereof no state process had been served on nor any state action commenced against the defendant Charleroi-Monessen Hospital, that the statute of limitations applicable to plaintiff's claim had expired prior to receipt by his counsel of the said Order of Dismissal, one of the essential guidelines of *McSparran et al. v. Weist et al.*, 402 F. 2d 867 (3 Cir. 1968)

has not been met and the plaintiff's Motion to Alter is hereby granted. It is Ordered that the Order of Dismissal dated April 14, 1969, be and the same is hereby vacated as to the defendant Charleroi-Monessen Hospital, and the Motion of the said Charleroi-Monessen Hospital to Dismiss is hereby denied.

It further appearing that state actions had been commenced against the remaining two defendants prior to the entry of this court's Order of April 14, 1969, plaintiff's Motion to Amend as to the defendants E. E. Somers and W. J. Mitchell is hereby denied.

S/ HERBERT P. SORG, *D. J.*

cc: Hymen Schlesinger, Esq.,
716 Carlton House, Pgh., Pa. 15219

Bruce R. Martin, Esq.,
945 Oliver Bldg., Pgh., Pa. 15222

Thomson, Rhodes & Grigsby, Esqs.,
1524 Frick Bldg., Pgh., Pa. 15219

Appendix D

Received.
Nov 15 1969
THOMSON, RHODES & GRIGSBY

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT F. PETTY, Guardian of the Estate of ARDELL DONALDSON, a minor,

Plaintiff,

vs.

E. E. SOMERS, W. J. MITCHELL and CHARLEROI-MONESSEN HOSPITAL,

Defendants.

Civil No. 68-168.

ORDER.

AND NOW, this 14th day of November, 1969, it appearing that plaintiff has filed a motion for certification or in the alternative to alter or amend the Judgment and Orders and that the defendant Charleroi-Monessen Hospital has filed a motion to amend Order of Court, now therefore,

IT IS ORDERED that the Judgments and Orders of April 14, 1969 and October 15, 1969 be and are hereby vacated in order that the court may give consideration to said motions and to make a proper determination of all matters relevant.

S/ HERBERT P. SORG, *D. J.*

cc: Hymen Schlesinger, Esq.
204 Carlton House, Pgh., Pa. 15219

Thomson, Rhodes & Grigsby, Esquires
1524 Frick Bldg., Pgh., Pa. 15219

Bruce R. Martin, Esquire
945 Oliver Bldg., Pgh., Pa. 15222

Appendix E

Received
Mar 26 1970
THOMSON, RHODES & GRIGSBY

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT F. PETTY, Guardian of the Estate of ARDELL DONALDSON, a minor,

Plaintiff.

vs.

E. E. SOMERS, W. J. MITCHELL and CHARLEROI-MONESSEN HOSPITAL,

Defendants.

Civil No. 68-168.

MEMORANDUM.

On February 7, 1968, plaintiff, a resident of New Jersey, brought this action as guardian for Ardell Donaldson, a Pennsylvania minor, for personal injuries allegedly sustained as a result of negligent treatment by the individual

doctor defendants while a patient in the corporate hospital defendant.

In reliance on *Corabi v. Auto Racing, Inc.*, 264 F. 2d 784 (3 Cir. 1959) the non-resident plaintiff had been appointed guardian for the purpose of creating diversity of citizenship between the parties.

On November 8, 1968, the defendants moved to dismiss pursuant to *McSparran v. Weist*, 402 F. 2d 867 (3 Cir. 1968). Plaintiff thereupon commenced actions in the appropriate state courts against the individual defendants, but failed to file an action against the hospital.

After hearing, an order was entered by this court on April 14, 1969, stating, *inter alia*, as follows:

> ". . . [I]t appearing that the said Robert F. Petty, a plaintiff in the above action, was appointed as guardian for the sole purpose of creating diversity of citizenship between the parties, that there is ample time and opportunity for the plaintiff to institute a new action in the appropriate state court, and that no unreasonable burden will be imposed on the plaintiff, IT IS ORDERED that the above action be and the same is hereby dismissed. . . ."

Subsequently, on motion by the plaintiff to amend the judgment of dismissal, the court became aware of its oversight in computing the two-year statutory period of limitations from February 7, 1968, the date of the filing of plaintiff's complaint, instead of April 14, 1967, the date on which the alleged cause of action arose. It appearing, therefore, that notice of the order of dismissal was not received by the plaintiff until after the statutory period for the commencement of a state action against the hospital had expired, his motion to amend the April 14, 1969 order of dis-

missal was granted as to the Charleroi-Monessen Hospital and denied as to the defendants against whom state actions had been timely commenced. The matter is now before the court on motions of the hospital and the plaintiff to reconsider. Plaintiff requests reinstatement as to all defendants, asserting undue hardship in pursuing this remedy in two fora, and the hospital asserts that plaintiff's failure to proceed against it in the appropriate state court before expiration of the statute of limitations constituted an abandonment of his claim against the hospital. The hospital refuses to waive its statute of limitations defense.

This court concludes that the filing of the order to dismiss on the same day the statute of limitations became effective was a mere fortuitous circumstance that did not result in prejudice to the plaintiff. It is deemed significant that, during the interval between hearing on defendants' motion and the order of dismissal, state actions against the *individual defendants only* had been commenced. It appears, therefore, that plaintiff's very eminent and capable counsel made a calculated negative decision on the issue of agency between the individual and corporate defendants.

Under these circumstances, application of the jurisdictional rule of *McSparran v. Weist, supra,* as to the individual defendants seems appropriate. No valid additional reason, within the guidelines set forth in *Groh v. Brooks,* ___ F. 2d ___ (3 Cir. filed Jan. 14, 1970), for the appointment of plaintiff as guardian having been established, diversity was "manufactured," and the adequacy of time for the institution of state action is a moot issue.

As to the corporate defendant, plaintiff, fully aware of the existence of the rule, had ample time to institute state action after his reliance on *Corabi, supra,* was dispelled. Having adequately protected himself as to the individual

defendants and having chosen to permit the statute of limitations to run with respect to the corporate defendant, the rule would not cause him to be "unfairly denied his day in court," *Groh, supra*, nor do the circumstances "make it [dismissal] seriously unjust or inequitable." *Law v. Converse*, 419 F. 2d 38 (3 Cir. 1969). Nevertheless, the limitation on dismissals under *McSparran*, set forth in 402 F. 2d 867, at page 477, precludes its application where, as in this case, the dismissal was not entered before the last day for filing a state court action.

> "In cases involving causes of action which arose prior to . . . [October 2, 1968] . . . a district court shall apply the new rule . . . only where the court finds that . . . there is ample time and opportunity to institute a new action in the state court. . . ."

The motion to dismiss as to Charleroi-Monessen Hospital will, therefore, be denied. In view of the circumstances above set forth, however, plaintiff's plea for pendent jurisdiction over the individual defendants, asserting undue hardship, will be denied.

HERBERT P. SORG, *D. J.*

Dated: March 25, 1970.

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

ROBERT F. PETTY, Guardian of the Estate of ARDELL DONALDSON, a minor,

Plaintiff,

vs.

E. E. SOMERS, W. J. MITCHELL and CHARLEROI-MONESSEN HOSPITAL,

Defendants.

Civil No. 68-168.

ORDER.

AND NOW, this 25th day of March, 1970, after hearing and upon due consideration of the motions of plaintiff, Roberty F. Petty, Guardian of the Estate of Ardell Donaldson, a minor, and defendant, Charleroi-Monessen Hospital, for reconsideration, for the reasons stated in the foregoing Memorandum, IT IS ORDERED that the above action be and the same is hereby dismissed as to the defendants, E. E. Somers and W. J. Mitchell, and the motion of Charleroi-Monessen Hospital to dismiss be and the same is hereby denied.

HERBERT P. SORG, *D. J.*

CC: Hymen Schlesinger, Esquire
716 Carlton House, Pgh., Pa. 15219

Bruce R. Martin, Esquire
945 Oliver Bldg., Pgh., Pa. 15222

Robert S. Grigsby, Esquire
1524 Frick Bldg., Pgh., Pa. 15219

Appendix F

Received
Apr 9 1970
Thomson, Rhodes & Grigsby

IN THE
DISTRICT COURT OF THE UNITED STATES
For the Western District of Pennsylvania

ROBERT F. PETTY, Guardian of the Estate of ARDELL DONALDSON, a minor,

Plaintiff,

vs.

E. E. SOMERS, W. J. MITCHELL and CHARLEROI MONESSEN HOSPITAL,

Defendants.

Civil No. 68-168.

ORDER.

It having been determined, as set forth in this court's Memorandum and Order of March 25, 1970, in the above entitled case, that the motion of defendants, Dr. E. E. Somers and Dr. W. J. Mitchell, for judgment of dismissal be granted, and the motion to dismiss of Charleroi-Monessen Hospital be denied, and there being no just reason for delay; It is Hereby Ordered, pursuant to the provisions of Rule 54(b) of the Federal Rules of Civil Procedure,

that judgment of dismissal be entered against the plaintiff, Robert F. Petty, Guardian of the Estate of Ardell Donaldson, a minor, and in favor of the defendants, Dr. E. E. Somers and Dr. W. J. Mitchell.

S/ HERBERT P. SORG, *D. J.*

Dated: April 8, 1970.

cc: Hymen Schlesinger, Esquire
716 Carlton House, Pgh., Pa. 15219

Bruce R. Martin, Esquire
945 Oliver Bldg., Pgh., Pa. 15219

Robert S. Grigsby, Esquire
1524 Frick Bldg., Pgh., Pa. 15219

Appendix G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Nos. 18,969/70.

ROBERT F. PETTY, Guardian of the Estate of
ARDELL DONALDSON, a minor,
Appellant at No. 18969,

v.

E. E. SOMERS, W. J. MITCHELL,
Appellees,

and

CHARLEROI-MONESSEN HOSPITAL,
Appellant at No. 18970.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF PENNSYLVANIA

Argued January 8, 1971.

Before: GANEY and ADAMS, *Circuit Judges*, and
WEIS, *District Judge*.

OPINION OF THE COURT.

(Filed March 1, 1971.)

PER CURIAM:

Plaintiff, a citizen of New Jersey, brought this action as guardian for Ardell Donaldson, a Pennsylvania citizen, against the defendants, individual doctors and hospital,

also citizens of Pennsylvania. The suit is based on a claim for personal injuries received as a result of alleged medical malpractice.

The district court found that diversity had been "manufactured"; that suits had been filed in state courts against the individual defendants before the statute of limitations had run; but that timely action had not been taken against the hospital which refused to waive the limitations defense.

Following the holding of McSparran v. Weist, 402 F. 2d 867 (3rd Cir. 1968), cert. den. *sub nomine* Fritzinger v. Weist, 395 U. S. 903, 89 S. Ct. 1739, 23 L. Ed. 2d 217 (1969), the district court dismissed the action as to the individual defendants but denied the motion of the defendant hospital.

The plaintiff appellant disputes the factual determinations made by the lower court but the record contains ample support for the findings and we will not disturb them.

The hospital appellant contests prospective application of the "manufactured diversity" doctrine. This issue was considered and decided adversely to appellant by the court *en banc* in McSparran v. Weist, *supra*. Accord: Green v. Hale, 433 F. 2d 324 (5th Cir. 1970); Lester v. McFaddon, 415 F. 2d 1101 (4th Cir 1969).

The judgment will be affirmed.

A True Copy:

Teste:

....,

Clerk of the United States Court of Appeals for the Third Circuit.

Appendix H

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18969 and 18970.

ROBERT F. PETTY, Guardian of the Estate of
ARDELL DONALDSON, a minor,

vs.

E. E. SOMERS, W. J. MITCHELL and CHARLEROI
MONESSEN HOSPITAL.

ROBERT F. PETTY, Guardian of the Estate of
ARDELL DONALDSON, a minor,
Appellant in No. 18,969.

CHARLEROI-MONESSEN HOSPITAL,
Appellant in No. 18,970.

(D. C. Civil Action No. 68-168.)

ON APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: GANEY and ADAMS, *Circuit Judges* and
WEIS, *District Judge*.

JUDGMENT.

These causes came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and were argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court filed March 25, 1970, be, and the same is hereby affirmed, with costs taxed in favor of appellees.

ATTEST:

THOMAS F. QUINN,
Clerk.

March 1, 1971.

Appendix I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 18,970 and 18,972.

ROBERT F. PETTY, Guardian of the Estate of ARDELL DONALDSON, a minor,

vs.

E. E. SOMERS, W. J. MITCHELL and CHARLEROI-MONESSEN HOSPITAL,

CHARLEROI-MONESSEN HOSPITAL,
Appellant in No. 18,970.
and Petitioner in No. 18,972.

SUR PETITION FOR REHEARING.

Present: HASTIE, *Chief Judge,* and
GANEY, SEITZ, VAN DUSEN, ALDISERT,
ADAMS, GIBBONS AND ROSENN, *Circuit Judges,*
and Weis, *District Judge.*

The petition for rehearing filed by Charleroi-Monessen Hospital, Appellant-Petitioner, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available cir-

cuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court *en banc*, the petition for rehearing is denied.

BY THE COURT,
ARLIN M. ADAMS,
Circuit Judge.

Dated: April 13, 1971